BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARVA JOLENE ADEE, deceased	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,029,382
RUSSELL STOVER CANDIES, INC.	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INDEMNITY COMPANY	)	
OF AMERICA	)	
Insurance Carrier	)	

ORDER

Decedent's surviving spouse (hereinafter referred to as "claimant") appeals the May 4, 2007 Award of Administrative Law Judge Bryce D. Benedict. Claimant was denied an award in this matter after the Administrative Law Judge (ALJ) found that respondent's emergency care was adequate under the circumstances and thus respondent had no liability.

Claimant appeared by his attorney, Patrik W. Neustrom of Salina, Kansas. Respondent and its insurance carrier appeared by their attorney, Brenden W. Webb of Overland Park, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on August 7, 2007.

ISSUE

Was respondent negligent in providing emergency care to the decedent, Marva Jolene Adee, (hereinafter referred to as "decedent"), in an emergency situation? Claimant argues that respondent trained its supervisors to use CPR and an AED[1] device. Claimant argues that this training created a duty on respondent's part to provide adequate care in emergency situations. When the decedent suffered her heart attack, several supervisors

[1] Automatic external defibrillator.

for respondent assisted in her attempted resuscitation. Claimant alleges respondent failed in this duty, providing less than adequate emergency care. Respondent argues no such duty existed, and if it did, then respondent properly treated the decedent until emergency personnel arrived.

FINDINGS OF FACT

The decedent was an employee of respondent on February 7, 2006, when she suffered a heart attack. Claimant does not allege the heart attack was precipitated by unusual stress, or an outside agent or external force.[2] Claimant, instead, argues that the death occurred as the result of negligence on the part of several respondent employees while providing emergency medical aid to the decedent before emergency personnel arrived.

On the morning of February 7, Belinda Alexander (Belinda), a supervisor for respondent, saw the decedent lying on the floor of the plant shortly after the plant began operations. Belinda called her supervisor, Alvis Nuttelman (Al), a plant superintendent, and requested he call 911. A call to 911 was made immediately, and Al went to the location where the decedent was lying. At some point, respondent's leadman, Anthony Johnson (A.J.), also arrived and began CPR on the decedent. A.J. was not certified in CPR, but had been trained while in the military. A.J. had, on several occasions while in the military, been forced to use CPR on fellow soldiers. However, he had not been in the military since 1994 and had undergone no training since that time. A.J. began by giving the decedent two breaths and then began chest compressions. Mona Pohlman (Mona), another supervisor for respondent, began looking for a mouth piece to be used while giving the breaths. However, it took at least two minutes to find the mouth piece. Belinda ultimately found the mouthpiece and gave it to Mona.

What occurred while Mona was looking for the mouth piece is in dispute. A.J. testified he was told to quit providing CPR while Mona looked for the mouth piece. In fact, A.J. testified that he was forcibly pulled off the decedent by Mona before she began the mouth piece search. According to A.J., the decedent was given no CPR while Mona looked for the mask. Mona testified that when she went to look for the mouth piece, A.J. was still doing CPR. Mona denies pulling A.J. off claimant before returning with the mask. Mona did acknowledge pulling A.J. off the decedent when she took over CPR, because he was not certified. A.J. was instructed to step back when Mona arrived with the mouth piece.

Al testified that A.J. was giving CPR while Mona looked for the mouth piece. He testified that A.J. was there, giving CPR the entire time. He was concerned that A.J. was

[2] See K.S.A. 2005 Supp. 44-501(e).

not certified, and when Mona returned with the mouth piece, she took over the CPR process. Al was concerned because he did not believe that A.J. was doing the CPR correctly. He only witnessed A.J. doing the breathing, and not the chest compressions. However, Al was not present the entire time while Mona was looking for the mask. Thus, he would not have been there the entire time A.J. was giving CPR. Both Al and Mona had been trained in the use of an automatic external defibrillator (AED). A.J. had not. However, no one thought to get the AED before the arrival of the EMTs, even though the AED was located only approximately 30 seconds away from the site where the decedent fell. Al testified all the supervisors had only recently been trained in the use of the AED, receiving only, at most, 30 minutes training on the device. The AED had only recently been purchased by respondent. Respondent employed both EMTs and nurses, but at 5:45 a.m., no EMTs or nurses were on duty.

Heather Collins (Heather), respondent's health and safety coordinator, had received three years of medical training before coming to work for respondent. She described the training that respondent's supervisors receive. All supervisors are currently provided CPR training by the Red Cross. However, Lisa Champ, Heather's predecessor, did teach CPR to the supervisors.

EMT Joseph A. Dickinson was one of the paramedics that provided treatment to the decedent. The call to his dispatcher came in at 5:45 a.m. and they arrived at respondent's plant at 5:51 a.m. It took approximately one and a half to two minutes to set up before they began rendering aid to the decedent. CPR was in progress when they arrived. They checked the decedent's pulse to determine if CPR was being done properly. A pulse was noted and, in his opinion, CPR was being done properly. Mr. Dickinson noted a police officer was doing CPR when he arrived. No one working for respondent testified to a police officer being present and assisting in CPR before the EMTs arrived. While the EMTs were providing treatment, they would periodically stop CPR to check the decedent's pulse. When CPR was stopped, there was no pulse present. The EMTs utilized an AED and administered the first shock to the decedent at 5:55 a.m.

Mark T. Mikinski, M.D., board certified in cardiology, testified regarding the activities occurring after claimant's heart attack. EMS records available to Dr. Mikinski noted the EMS activation at 5:45 a.m. with EMS arrival at 5:51 a.m. Dr. Mikinski estimated the decedent went down at 5:44 a.m. The EMT records indicated the first shock was administered at 5:55 a.m. The decedent died as the result of acute myocardial infarction, commonly known as a heart attack, manifested by the development of dysrhythmia or ventricular fibrillation. In effect, the decedent suffered a heart attack, and her heart developed a rhythm disturbance and was not pumping blood to her brain and other organs.

Dr. Mikinski opined that CPR provides, at best, only 10 to 15 percent efficiency in blood flow when compared to a normal cardiac contraction. However, 10 to 15 percent is better than nothing. If a person has ventricular fibrillation, and an AED is used to administer a shock within the first 30 seconds, survival is almost 100 percent. A shock

administered in under three minutes achieves a 74 percent survival rate. When the time increases to over three minutes, the survival rate drops quickly. At five minutes, the survival rate, even with the use of an AED, is only 5 percent. Dr. Mikinski testified that a cessation in CPR likely contributed dramatically to the development of anoxic encephalopathy, which is a disease process in the brain caused by a lack of oxygen. He also noted that the decedent went down at 5:44 a.m. and the first shock was not administered until 5:55 a.m. This put the decedent in the 5 percent or less survival category. A life-sustaining rhythm was not achieved with the decedent until 6:14 a.m. Dr. Mikinski saw nothing in the quality of care provided by the EMTs, Memorial Hospital in Abilene or Salina Regional Health Center that fell below the accepted standard of care.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> Where an employee is negligently treated for nonwork-related injuries by an employer or co-employee whose job is to provide medical treatment to employees, there is a sufficient causal connection to make any aggravation of the injury or additional injury arising from that treatment compensable under the Workers Compensation Act.[5]

In *Scott*, a claimant suffered a heart attack while working for Wolf Creek. It was stipulated the heart attack was not work related. The claimant was, however, treated by two physician's assistants employed by Wolf Creek and by their supervising physician. A medical malpractice action was filed against Wolf Creek by the claimant's estate and heirs, arguing that the claimant lost a chance of surviving the heart attack because of the negligent treatment received from the physician's assistants. The district court originally granted summary judgment in favor of the defendants, ruling that the plaintiff's (claimant's) suit was barred by the exclusive remedy provision of the Workers Compensation Act. The Court of Appeals held that (1) the heart amendment to the Workers Compensation Act did not bar a workers compensation claim based on an allegation that the employee suffered

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[3] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] *Scott v. Wolf Creek Nuclear Operating Corp.*, 23 Kan. App. 2d 156, Syl. ¶ 5, 928 P.2d 109 (1996).

a loss of chance of survival of the heart attack due to the employer's or co-employee's negligence; and (2) the employee's lost chance of survival resulting from the co-employee's alleged negligent treatment arose out of and in the course of the employee's employment.

Here, as in *Scott*, it has been stipulated that the heart attack did not arise out of and in the course of the decedent's employment. There has been no allegation that the decedent's level of exertion was, in any way, more than the decedent's usual work. Additionally, claimant is not alleging the heart attack is the product of some external force, which renders the heart amendment inapplicable.[6] The sole dispute centers around the care given to the decedent after the heart attack was suffered on respondent's premises.

Respondent's contention centers around the *Scott* finding that the Wolf Creek employees were trained medical personnel, hired for the sole purpose of providing medical treatment to Wolf Creek employees for both occupational and non-occupational diseases and injuries. This respondent's employees, who provided post-heart-attack CPR, were supervisors and a leadman, not trained medical personnel. The court, in *Scott*, citing 2A Larson's Workmen's Compensation Law § 68.35 (1996), stated:

> [W]hen the employer's participation in the episode goes beyond mere examination and extends to some kind of active conduct or attempted treatment by the employer or his employees aggravating the noncompensable condition, this has usually been held to be sufficient to endow the matter with compensable character and hence bar a damage suit.[7]

Normally, the negligence of the employer or a co-employee is not considered in workers compensation litigation. Workers compensation, traditionally, is,

> . . . based on the theory of taxing the industry for the loss sustained by accidental injury to a workman while employed in such industry, and compensation is to be paid regardless of the negligence of the employer or even the fault of the workman.[8]
>
> It never was the purpose of the Compensation Act that the employer should in all respects be an insurer of the employee . . . .[9]

However, the court, in *Scott*, considered, as a significant factor, the negligence of co-employees. Here, unlike *Scott*, the co-employees, rather than being trained medical

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[6] *Mudd v. Neosho Memorial Regional Med. Center*, 275 Kan. 187, 62 P.3d 236 (2003).

[7] *Scott, supra*, at 160.

[8] *Welden v. Edgar Zinc Co.*, 129 Kan 422, 283 Pac. 618 (1930).

[9] *Rush v. Empire Oil & Refining Co.*, 140 Kan. 198, 34 P.2d 542 (1934).

personnel, were co-workers with minimal CPR and AED training. Did their actions, or did their inaction, constitute negligence or inflict further injury sufficient to allow jurisdiction under the Kansas Workers Compensation Act? The Board, under these facts, concludes the answer is no. These employees were merely workers caught up in a "sudden emergency".

> The theory and rule of the doctrine of "sudden emergency" is that one who, in a sudden emergency, acts according to his best judgment, or one who, because of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence.[10]

> When one is confronted with a sudden peril requiring instinctive action, he is not, in determining his course of action, held to the exercise of the same degree of care as when he has time for reflection . . . .[11]

Likewise, one who has spent years being trained to administer medical treatment will be held to a higher standard of care than one receiving only minimal CPR and AED training. Unlike in *Scott*, none of these co-workers' jobs were to provide emergency medical care or treatment. For negligence to exist, there must be a duty and a breach of that duty before the conduct becomes actionable. If no duty exists, there can be no negligence.[12]

The employees working for respondent found themselves in a "sudden emergency" and responded with admirable haste. The decedent was provided emergency care sufficient to cause her color to improve, but not sufficient to save her life. The time limits testified to by Dr. MIkinski were very brief. The ALJ's finding that the care rendered was "adequate under the circumstances" is a proper finding and is affirmed by the Board. The duty to treat applied by the court in *Scott* is not applicable to these circumstances.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

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[10] *Jobst v. Butler Well Servicing, Inc.*, 190 Kan. 86, 91, 372 P.2d 55 (1962).

[11] *Lawrence v. Deemy*, 204 Kan. 299, 303, 461 P.2d 770 (1969).

[12] *Madison v. Key Work Clothes*, 182 Kan. 186, 318 P.2d 991 (1957).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated May 4, 2007, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrik W. Neustrom, Attorney for Claimant
Brenden W. Webb, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge